BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and	)	MM Docket No. 92-259
Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS
OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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SUMMARY

INTV contends that adherence to the following principles will lead to sound interpretation and implementation of the Act:

- The must carry and channel positioning requirements in the new law are the RULE! They must not be gutted or watered down by exceptions. Exceptions should be just that -- exceptions, permitted only when justified by compelling showings of genuine need.

- The Commission need not create new and expanded loopholes out of fear of constitutional rejection. Congress was aware of the constitutional infirmities of previous must carry requirements and incorporated many provisions to eliminate them.

- The basic scheme of the new must carry and channel positioning rules is to provide the opportunity for carriage for all stations in a community. This most faithfully maintains the integrity of the table of television channel allotments and the competitive environment it was designed to engender.

- The Commission should resist mightily the temptation to prejudge each and every hypothetical situation which might occur under the new requirements. Many of them may never occur. Others might be resolved easily without resort to the Commission's processes. The Commission will use the limited time allotted for this proceeding most efficiently if it maintains a narrow focus on real and significant issues which "positively, absolutely" must be resolved prior to April 6, 1993.

INTV also offers the following more specific recommendations for Commission action on the more significant and immediate issues raised in the *Notice*:

INTV favors faithful adherence to the ADI must carry approach.

- Regardless of the "legal" location of a cable system, the system should be required to provide every subscriber home in a particular market (adi) all local signals from that market.

- Every community should be assigned to at least one market.the commission must maintain carriage of all stations from a market in any adjustment to the adi-identity of a community.

- Historical carriage patterns should be the primary determinative factor absent a showing of changed circumstances

- Mileage is a fundamentally arbitrary factor which ought be ignored.

The Commission also should take the following positions with respect to other significant questions:

- Section 76.51 should be expanded to all markets and amended triennially.
- Must carry signals should remain subject to the network and syndicated program exclusivity rules.
- Substantial duplication for purposes of section 614(b)(5) should be defined as simultaneous program duplication exceeding 50% of the station's hours of operation between 6 a.m. and 12 midnight.
- The commission should adopt no rigid priority scheme for resolving conflicting claims to the same channel position on a cable system.
- The Commission should declare a broadcast licensee's right to elect and grant retransmission consent inalienable and exclusive to the licensee.
- A local signal carried pursuant to retransmission consent must be carried in its entirety.
- Although retransmission consent contracts between cable systems and broadcast licensees properly are matters for local courts, the Commission still should impose sanctions for unauthorized carriage of a broadcast station signal.
- Must carry and channel positioning rules should become effective immediately with full compliance required within 45 days.
- Stations should be permitted to make their initial election at any time prior to october 6, 1993.
- The Commission should leave this proceeding open for three years to permit adjustments based on experience under the new law.

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COMMENTS
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The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its comments in response to the Commission's *Notice of Proposed Rule Making*, MM Docket No. 92-259, FCC 92-499 (released November 19, 1992) [hereinafter cited as *Notice*]. Therein the Commission proposed rules to implement portions of the Cable Television Consumer Protection and Competition Act of 1992. Pub. L. No. 102-385, 102 Stat. ___(1992) [hereinafter cited as the "Act"] regarding cable carriage of broadcast television signals.[1]

INTV's main priority throughout the legislative debate was enactment of statutory "must carry" requirements. Such requirements now are embodied in §§614 and 615 for commercial and noncommercial broadcast television stations,

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[1]The specific provisions before the Commission in this proceeding are §§4, 5, and 6, which will be codified as §§614, 615, and 325(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151 *et seq.* INTV will refer to these sections in their codified form.

respectively. Their implementation in a manner consistent with their purposes and Congressional intent now is INTV's paramount concern.

In INTV's view the Commission must avoid losing sight of the forest as it assesses, prunes, grooms, trims, and tends the various trees Congress has planted and entrusted to the Commission's care. In that regard, INTV submits the following general principles to govern the Commission's deliberations concerning the implementation of the must carry and retransmission consent provisions of the Act:

First, the must carry and channel positioning requirements in the new law are the RULE! They must not be gutted or watered down by exceptions. Exceptions should be just that -- exceptions, permitted only when justified by compelling showings of genuine need.

Second, Congress was aware of the constitutional infirmities of previous must carry requirements and incorporated many provisions to eliminate them. The Commission need not create new and expanded loopholes out of fear of constitutional rejection.

Third, the basic scheme of the new must carry and channel positioning rules is to provide the opportunity for carriage for all stations in a community. This most faithfully maintains the integrity of the table of television channel allotments and the competitive environment it was designed to engender.

Fourth, the Commission should resist mightily the temptation to prejudge each and every hypothetical situation which might occur under the new requirements. Many of them may never occur. Others might be resolved easily without resort to the Commission's processes. The Commission will use the limited time allotted for this proceeding most efficiently if it maintains a narrow focus on real and significant issues which "positively, absolutely" must be resolved prior to April 6, 1993.

Fifth, and in the same vein, the Commission should not revisit exclusivity and other peripheral issues in this phase of this proceeding.

INTV contends that adherence to these principles will lead to sound interpretation and implementation of the Act. INTV also offers the following more specific recommendations for Commission action on the more significant and immediate issues raised in the *Notice*:

1. REGARDLESS OF THE "LEGAL" LOCATION OF A CABLE SYSTEM, THE SYSTEM SHOULD BE REQUIRED TO PROVIDE EVERY SUBSCRIBER HOME IN A PARTICULAR MARKET (ADI) ALL LOCAL SIGNALS FROM THAT MARKET.

The law essentially requires a cable system to carry stations from the ADI in which the cable system is located. No definition of the location of a cable system should be allowed to defeat the basic requirement of the Act. A cable household located in a particular ADI should be provided with signals from stations in that ADI. The location of the cable system's head-end should have nothing to do with it. If a cable system straddles more than one ADI (*i.e.*, serves households in more than one ADI), then households in each ADI should receive broadcast signals local to that ADI.

This should impose no undue difficulty for cable systems, even if they straddle two markets, but operate with a single head-end. First, the number of channels a cable system must devote to local signals is limited. Second, neither duplicate affiliates nor other stations with substantially duplicative programming need be carried. Third, signals considered distant for copyright purposes need be carried only if the station agrees to reimburse the cable system for the royalty costs

incurred by the system. Fourth, stations which fail to provide a good quality signal or baseband video signal need not be carried.[2]

Finally, the Commission has ample authority to prevent demonstrably arbitrary and burdensome applications of the general rule.

However, INTV would urge the Commission to refrain from granting "perpetual" waivers or special relief. Cable technology hardly is static. Channel compression and addressability will eliminate much of the burden of structuring signal carriage to accommodate local signals from two markets in the homes in those markets, despite transmission from a single head-end. Cable systems which might face technical limitations today in such situations probably will upgrade their facilities at some point in the future. Therefore, waivers should be limited in duration.

In any event, the Commission should not create a legal fiction to permit cable systems to ignore geographic, political, and market boundaries so as to escape the most basic obligations imposed by the statute.

2. THE COMMISSION SHOULD ADOPT A LIST OF COUNTIES FOR EACH ADI AND AMEND THAT LIST EVERY THREE YEARS.

The Commission ought to recognize the Arbitron list of ADI counties and for purposes of the rules recognize changes in the Arbitron list every three years.[3] First, a triennial redesignation of counties would permit long term county shifts to be assimilated without a year-to-year lurch in carriage patterns. The shifting of counties from one ADI to another raises the possibility that a cable system's carriage obligations could change from year to year. An annual flip-flop between ADIs would

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[2]Section 614(h)(1)(B)(iii) includes a specific definition of good quality signal, which the Commission ought apply without alteration.

[3]Thus, the 1991 list will govern 1993-1995, the 1994 list would govern 1996-1998, and so on.

be aggravating to stations, cable systems and viewers. Furthermore, a temporary, but anomalous county shift would disrupt viewing patterns needlessly.

Second, it could and should parallel stations' triennial election between must carry and retransmission consent status, as well as other triennial market list adjustments.[4]

Third, it would allow affected stations and cable systems to seek adjustments in community market designations in advance of the effective date of the county's new ADI assignment.[5] Notice of changes should be provided well in advance so as to leave ample time for adjustments by stations and systems, including in particular requests to the Commission to preserve local carriage of stations from the ADI to which the county previously was assigned. Therefore, no loss of carriage need occur in dual market communities.

Such triennial modifications of county ADI assignment purposes would contribute to carriage stability, prevent an anomalous and temporary shift from disrupting carriage, and eliminate many of the inevitable requests for special relief in such situations.

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[4]*E.g.*, the triennial modification of the top 50 market list for purposes of the prime time access rule.

[5]Situations in which the ADI reassignment of the county would be meaningful to stations probably would involve cable systems in overlapped communities where the Commission readily could provide for dual market carriage obligations. For example, if a county assigned to the Washington ADI and located between Washington and Baltimore were redesignated as part of the Baltimore ADI, the Commission could act to preserve the local carriage rights of Washington stations.

3. THE FOLLOWING GUIDELINES SHOULD GOVERN CHANGES IN THE COMPOSITION OF TELEVISION MARKETS.

INTV urges the Commission to use its power to add or remove communities from a television market (*i.e.*, ADI) consistent with Congressional intent. Congress carefully considered the proper scope of a station's local carriage area and chose the ADI as "the most common industry definition of a television market and one used by the FCC for many years in regulations."[6] Moreover, the Congress admonished the Commission to make adjustments "to include or exclude particular communities from a television station's market consistent with Congress' objective to assure that television stations be carried in the areas which they serve and which form their economic market."[7] As Congress emphasized, "[I]n most instances a station's ADI is consistent with the area where such station provides local service."[8] Therefore, departures from the basic ADI carriage scheme should be entertained judiciously and, in INTV's view, according to the following considerations:

A. EVERY COMMUNITY SHOULD BE ASSIGNED TO AT LEAST ONE MARKET.(¶19)

The Commission should not eviscerate the ADI market definition by summarily pulling communities out of markets. The heart of the ADI concept is the assignment of every county (and, thereby, community) to a television market. This concept ought be preserved. The power to remove a community from an ADI must be exercised sparingly. As Congress expressly directed:

> The provisions of subsection [614](h)(1)(C)] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. *It is not the Committee's intention that*

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[6]H.R. Rep. 102-628, 103d Cong., 2d Sess., at 66 [hereinafter cited as "H. Rep."].

[7]*Id.* at 97.

[8]*Id.*

> *these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section.*[9]

INTV also notes that every county always has been assigned to an ADI, based on viewing in that county. Indeed, long before cable was widespread, some ADIs extended great distances from the primary communities in their markets. The maps showing the Salt Lake City and Denver ADIs from the 1965 Television Factbook illustrate this point.[10]

Finally, as noted above, Congress favored ADI-wide carriage for sound and sufficient reasons. The Commission must resist any temptation to dismantle that scheme by selectively undermining the foundation of the system. Part of that foundation is the concept that no county be "a county without an ADI" so to speak. Therefore, the Commission should remain steadfastly reluctant to *exclude* any community from an ADI without at the same time *including* it in another ADI.

B. NO STATION SHOULD BE DELETED OR REFUSED CARRIAGE WHILE A REQUEST TO MODIFY A COMMUNITY'S MARKET DEFINITION IS PENDING.

Neither a station nor cable system should be able to preempt application of the law while a request for an exception is pending. First, such requests will be considered on an expedited basis, so any harm from an anomalous situation will be short-lived. Second, granting any party the ability to unilaterally modify how a law applies would constitute a subtle form of regulatory anarchy. Third, well-defined legal obligations should be refined only via fully-considered regulatory decision making. The must carry rules are too precious to the FCC's basic goals to be left to the whim of those subject to regulation.

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[9]H. Rep. at 98 [emphasis supplied].

[10]See Exhibit 1, attached hereto.

C. BOTH CABLE OPERATORS AND BROADCASTERS SHOULD BE PERMITTED TO REQUEST CHANGES IN A COMMUNITY'S MARKET IDENTIFICATION.

First, the application of the must carry and channel positioning rules obviously is a matter of concern to television stations and cable systems alike. Neither should be left out of the process. Both should be permitted to initiate the process of refining the market identity of communities.

Second, cable systems and television stations often may have divergent interests. Cable operators may tend to want to exclude communities from markets. Stations likely will wish to add communities to their markets. (INTV recognizes that the opposite also could be true in some circumstances.) The Commission should not create a one-way street for adjustments. Therefore, television stations as well as cable systems should be permitted to request modifications of the market identity of communities.

D. ALL POTENTIALLY AFFECTED STATIONS AND CABLE SYSTEMS SHOULD BE SERVED WITH REQUESTS FOR CHANGES IN A COMMUNITY'S MARKET IDENTIFICATION.

A change in the market identification of a community could affect multiple stations and cable systems. Their carriage rights and obligations should not be subject to change via a proceeding in which they have been unable to participate.

E. THE COMMISSION MUST MAINTAIN CARRIAGE OF ALL STATIONS FROM A MARKET IN ANY ADJUSTMENT TO THE ADI-IDENTITY OF A COMMUNITY.

The Commission must pay heed to Congressional intent that Section 614(h)(1)(C) never should be a vehicle by which a cable system could "discriminate among several stations licensed to the same community."[11] As stated in the legislative history:

> Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be

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[11] H. Rep. at 98.

> permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[12]

In other words, the carriage regime established in Section 614 envisions market-by-market and market-wide carriage patterns. Only this approach fully comports with the purposes of the Act to preserve local service *and the level of competition in the market engendered by the table of allotments!* What Congress sought to prevent was just the sort of selective carriage of local stations which enabled cable systems to determine the "winners and losers" among local broadcast stations.

F. HISTORICAL CARRIAGE PATTERNS SHOULD BE THE PRIMARY DETERMINATIVE FACTOR ABSENT A SHOWING OF CHANGED CIRCUMSTANCES.

This is the first factor enumerated by Congress and undoubtedly the "best evidence" of whether a community should be identified with a particular television market. First, it is a reality-based and objective measure. It is far less relative and subjective than, for example, a service-based criterion. Second, it leaves little room for conflict over the substance or reliability of the evidence pertinent to the Commission's decision. Either stations from a particular market have been carried in a community or they have not.

G. SERVICE AND VIEWING CONSIDERATIONS SHOULD BE ACCORDED LITTLE WEIGHT.

Although Section 614(h)(1)(C)(ii) includes service and viewing factors as pertinent to a Commission decision to add or subtract a community from a market, the Commission ought accord them relatively little weight. First, service-based considerations ignore the purpose of must carry, to maintain the integrity of the table of allotments. The utility of a channel as a medium of transmission is unrelated to the programming supplied on the channel. Second, station service changes depending on local needs. A decision based on today'service may be grossly arbitrary based on next month's.

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[12] *Id.*

Significant reliance on viewing patterns is similarly unreliable. First, viewing patterns are service-based and, therefore, are subject to inherent infirmities delineated above. Second, to the extent viewing is synonymous with viewability, it would become a redundant surrogate for the signal strength requirement in Section 614(h)(1)(B)(3). No additional mechanism is necessary to assure that cable systems are relieved of the burden of carrying unavailable signals.

H. MILEAGE IS A FUNDAMENTALLY ARBITRARY FACTOR WHICH OUGHT BE IGNORED.

First, Congress eschewed mileage-based factors, and the Commission should be reluctant to resurrect them. As stated in the legislative history of Section 614:

> The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition.[13]

Second, two other provisions of the law already protect cable systems from the burden of carrying far distant "local" signals. Again, signals which are unavailable as good quality or video baseband signals and signals considered distant for copyright purposes need be carried only if the station assumes the burden of supplying the signal or paying the additional royalties.

Third, mileage, indeed, is arbitrary *vis-a-vis* the boundaries of an ADI or the range of any station's signal. Therefore, whereas mileage-based criteria remain in some Commission regulations, they should not be reinstalled in a statutory regime designed in large part to eliminate them.

I. THE COMMISSION'S EXISTING SPECIAL RELIEF PROCEDURES SHOULD BE EMPLOYED TO PROCESS REQUESTS FOR MODIFICATION OF A COMMUNITY'S MARKET IDENTIFICATION.

Except for the expanded service requirement, requests to modify the market identification of a community should be entertained as petitions for special relief.

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[13]H. Rep. at 97.

First, use of rulemaking procedures would be cumbersome and impose delay. This is contrary to the mandate that the Commission expedite consideration of such requests.

Second, the Commission has the authority under the rule to shorten the time periods for oppositions and replies, if necessary to expedite consideration of such requests. However, INTV would urge the Commission not to shorten the basic 30-day period for opposing requests. The type of information which might be relied upon often would require considerable review and analysis to permit a meaningful response.

Third, because the relief would focus on specific communities and what amounts to an exception to, rather than a modification of, a rule, rule making is unnecessary.

5. SECTION 76.51 SHOULD BE EXPANDED TO ALL MARKETS AND AMENDED TRIENNIALLY.

The Commission should amend §76.51 to include all markets and amend it every three years. This will track with the three-year must carry/retransmission consent election, as well as with the top 50 market adjustments for PTAR. Moreover, it will create a stable environment for carriage decisions. This will benefit stations, cable operators, and viewers alike.

The revisions should be made well prior to the triennial election between must carry and retransmission consent. Sufficient time should be allowed to permit stations to evaluate their new environment and negotiate with cable systems. Thus, in 1995, the Commission should amend §76.51, based on 1994 ratings service data.[14]

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[14]Again, the list should be expanded to all markets immediately and also include immediately a listing of the ADI designation for all counties.

In the same vein, the Commission should establish a presumption that all stations are significantly viewed throughout their ADIs. First, this involves no change in the Commission's rules. Second, it would further Congressional intent that stations be carried throughout their ADIs. As INTV has pointed out to the Commission, the showing required to establish significant viewing has become difficult or impossible to make, regardless of the station's level of viewing.[15] Third, the presumption would be rebuttable.

6. MUST CARRY SIGNALS SHOULD REMAIN SUBJECT TO THE NETWORK AND SYNDICATED PROGRAM EXCLUSIVITY RULES.

The Commission ought be especially reluctant to pre-judge this matter. First, the dimension of the problem is unknown. Moreover, the widespread occurrence of conflicting carriage and program deletion rights appears enormously unlikely. In the case of network stations,the system would be required to carry only one affiliate in any event. For independents, two stations in the same ADI rarely, if ever, would be licensed to broadcast the same syndicated program.

Second, Congress was aware of the Commission's exclusivity rules when it selected the ADI as the local carriage area. Whereas Congress carved out some exceptions to the general rule, a syndex or exclusivity related exception was not adopted. Indeed, Congress explicitly stated that:

> Nothing in this provision, however, is intended to affect federal copyright law, *nor is this provision intended to affect the FCC's authority to restrict the retransmission by cable operators of particular copyrighted broadcast programs on distant broadcast stations where local broadcast stations have secured the exclusive local rights to such programs....*[16]

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[15] *See* INTV Statement in Support of Petition for Rule Making, RM-7613 (filed March 11, 1991), copy of which is attached hereto, as Exhibit 2.

[16] H. Rep. at 92 [emphasis supplied].

Furthermore, Congress expressly envisioned that a local signal might be subject to deletion under the exclusivity rules:

> Subsection[614](b)(3)(B) prohibits "cherry picking" of programs from television stations by requiring cable systems to carry the entirety of the program schedule of the television stations they carry, *except to the extent that FCC rules intended to preserve local stations' exclusivity rights either permit cable systems to delete individual programs or insert substitutions for programs which cannot be carried on the system.*[17]

Finally, Congress did exempt noncommercial must carry signals from network nonduplication protection. Had it wished to do so for commercial stations as well, it could have -- but it did not. [18] The Commission should not second guess Congress in this regard, especially in the absence of evidence that a widespread problem exists.

7. SUBSTANTIAL DUPLICATION FOR PURPOSES OF SECTION 614(b)(5) SHOULD BE DEFINED AS SIMULTANEOUS PROGRAM DUPLICATION EXCEEDING 50% OF THE STATION'S HOURS OF OPERATION BETWEEN 6 A.M. AND 12 MIDNIGHT.

Congress has defined the term "'substantially duplicates'... to refer to the *simultaneous* transmission of *identical* programming on two stations which are each eligible to assert signal carriage protection under this section, and which constitutes a *majority* of the programming on each station."[19] Whereas cable systems hardly should be burdened with truly duplicative signals (e.g., carriage of duplicate affiliates), cable subscribers should not be arbitrarily denied stations which offer meaningful program and time diversity.

INTV does suggest that the definition focus on the periods of the day when viewing is significant. The value of programming diversity obviously is greater when more sets are in use. In the overnight hours, viewing is minimal and the

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[17]H. Rep. at 93 [emphasis supplied].

[18]*See* S.Rep. 102-92, 102d Cong., 1st Sess. at 89 [hereinafter cited as SR].

[19]H. Rep. at 94 [emphasis supplied].

value of program and time diversity decreases markedly. Therefore, INTV would peg the definition on simultaneous program duplication between the hours of 6 a.m. and 12 midnight.

The definition of a network for purposes of the duplicate affiliate provision easily could track the substantial duplication definition. A network could be defined as an entity providing programming for simultaneous broadcast by affiliated stations for more than 50% of the hours between 6 a.m. and midnight.

Furthermore, a more inclusive definition, which places greater discretion in the hands of cable operators, opens the doors to just the sorts of anticompetitive behavior Congress sought to end via the new rules.

8. THE INTERIM DEFINITION OF A HOME SHOPPING STATION SHOULD BE BASED ON THE AMOUNT OF TIME DEVOTED TO SALES PRESENTATIONS BETWEEN THE HOURS OF 6 A.M. AND 12 MIDNIGHT.

The interim definition of a home shopping should focus on the mainstay of a station's program format. Whereas many independent stations have elected to carry some shopping or paid commercial programming, such programming hardly is the heart of the their program format. When carried during late-night hours, however, the amount of such programming might appear substantial. To avoid any misdefinition of a general audience independent as a home shopping station, as well as for the reasons stated above, INTV recommends excluding late night hours (12 midnight to 6 a.m.) from the definition's denominator.

9. THE COMMISSION SHOULD ADOPT NO RIGID PRIORITY SCHEME FOR RESOLVING CONFLICTING CLAIMS TO THE SAME CHANNEL POSITION ON A CABLE SYSTEM.

The Commission has raised the possibility that several must carry stations might have conflicting rights to the same channel position. INTV urges the Commission to refrain from establishing a pre-set priority scheme. First, the actual extent to which such conflicts will occur is unknown. The Commission need not leap into a conflict which may rarely arise.

Second, even if some such situations do arise, the law leaves ample flexibility for the affected stations to resolve their conflict without recourse to the Commission. Each station has three established channel options, plus the option of a channel mutually agreeable to the station and cable operator.[20]

Third, a rigid priority scheme may impose irrational results when applied to specific circumstances. This would spawn another spate of waiver or special relief requests -- directly contrary to the purpose of a fixed priority scheme in the first place. Even worse, stations and viewers might be harmed.

Fourth, a pre-existing priority scheme would dash any hopes of private resolution because the "winner" in an administrative resolution would be pre-ordained. All the bargaining power would be conferred on one party to the dispute. The disadvantaged party would be unlikely to enter a negotiation in that context.

Fifth, the Commission retains the flexibility to deal with the problem more knowledgeably in the future if it is flooded with requests to resolve channel position conflicts. If the Commission were to adopt rigid priorities now, it would find it much more difficult to adjust them to "reality" in the future.

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[20]Stations also have the option of negotiating both carraige position and carriage pursuant to Section 325(B).

Sixth, promoting private resolution among affected stations leaves the cable operator where he or she should be -- on the sidelines. What the Commission must avoid is handing discretion to determine channel position back to the cable operator. Congress for sound reasons removed the cable operator from the channel selection process (except with the station's assent), and the Commission must take no action to reestablish such power in local cable operators.

Finally, if the Commission insists on prejudging these situations via a priority scheme, then on-channel carriage should not be the first priority. Actual channel position on either July 19, 1985, or January 1, 1992, should be first. This would be least likely to cause disruption.

10. CABLE SUBSCRIBERS SHOULD BE NOTIFIED IN ADVANCE OF THE DELETION OR CHANNEL REPOSITIONING OF A COMMERCIAL STATION.

INTV urges the Commission to require, as it has suggested, that cable operators notify their subscribers in advance of the deletion or channel repositioning of a station. First, when a cable operator makes such a decision, it should bear the responsibility of seeking to prevent public confusion and the disruption of viewer habits which otherwise would ensue. Second, the potential for confusion is heightened because notification to subscribers will be required when noncommercial channels are shifted. This will create a public expectation that drops or shifts of commercial channels also will be the subject of advance notification.

11. THE COMMISSION MAY NOT PRESUME THAT THE REQUIREMENT FOR CARRIAGE OF MUST CARRY STATIONS ON THE BASIC TIER NEGATES A STATION'S RIGHT TO INSIST ON ON-CHANNEL CARRIAGE.

The Commission errs in assuming that Congress intended to provide for on-channel carriage only if that channel is included in the basic tier. Nothing in the Act provides any basis for such an assumption. Second, the technology of cable systems is evolving rapidly. No longer is the basic tier a creature of VHF channels 2-13. Current technology permits a cable system to conform a basic tier to reflect on-channel

carriage of all stations.[21] The Commission should not embrace interpretations which ignore technological progress.

In any event, it need not lock itself into a rigid position at this time. The Act leaves stations and cable systems the right to agree on channel position. In the rather unlikely event a channel 50 station insists upon on-channel carriage in lieu of a channel 2-13 position, then the Commission can deal with the problem. Indeed, the Commission could be flexible in providing special relief or waivers where demonstrable technical infeasibility exists. Nonetheless, it should not embrace questionable presumptions unnecessarily before the new rules have taken effect.

12. THE COMMISSION SHOULD MAINTAIN THE NETWORK-CABLE CROSS-OWNERSHIP REMEDIAL PROVISIONS PENDING COMPLETION OF JUDICIAL REVIEW OF THE NEW MUST CARRY REQUIREMENTS.

Although the requirements imposed by the new must carry rules supersede the remedial procedures (the so-called "negative must carry" provision) adopted in the cable-network cross-ownership proceeding, INTV urges the Commission to maintain the network-cable cross-ownership provision pending completion of litigation challenging the constitutionality of the must carry rules. Until such litigation has ended once and for all, the Commission cannot rely completely on the continuation of the must carry rules. Therefore, eliminating the remedial provisions applicable to network-owned cable systems would be premature. Therefore, maintaining the network-cable cross-ownership provisions is particularly appropriate at least until such time as the constitutional vitality of the must carry rules is finally resolved.

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[21] INTV recognizes that not all cable systems have installed state-of-the-art equipment. Nonetheless, the spread of advanced technology is inevitable and hardly can be ignored by the Commission.

INTV in no way endorses the negative must carry approach. Congress has found it inadequate.[22] Nonetheless, from the Commission's perspective, no rule should be abandoned based on the enactment of the new must carry rules until the new must carry provisions have survived judicial review.

13. STATIONS SHOULD BE PERMITTED TO FILE COMPLAINTS WITH THE COMMISSION ALLEGING A CABLE SYSTEM'S FAILURE TO COMPLY WITH THE MUST CARRY RULES ANY TIME AFTER RECEIVING THE INITIAL RESPONSE OF THE CABLE SYSTEM TO THE STATIONS NOTICE OF FAILURE TO COMPLY TO THE SYSTEM.

The Commission should eschew adding greater complication to the complaint process. Only the statutory time limits (including the basic statute of limitations on alleging violations of the Communications Act) should govern the Commission's complaint process.

14. NO FEES SHOULD BE REQUIRED FOR FILING OF COMPLAINTS THAT CABLE SYSTEMS HAVE FAILED TO COMPLY WITH THE MUST CARRY RULES.

Complaints to the Commission should require no fee. If the Commission were someday to find itself overburdened with truly frivolous complaints, then a fee might be appropriate (perhaps, with a refund if the complaint is found valid).

15. THE COMMISSION SHOULD DECLARE A BROADCAST LICENSEE'S RIGHT TO ELECT AND GRANT RETRANSMISSION CONSENT INALIENABLE AND EXCLUSIVE TO THE LICENSEE.

The Commission should interpret Section 325(b) as conferring an inalienable right on broadcast licensees to elect retransmission consent status and to grant or withhold retransmission consent. First, this interpretation does no more than acknowledge the parallel systems for preserving the rights of stations on one hand and program suppliers on the other. Congress has established a regime involving two distinct rights, which ought not be confused. Stations have a statutory right to

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[22]Conference Report at 44.

elect and then to grant or withhold retransmission consent for use of the *signals* by cable systems. Additionally, the copyright law grants program copyright owners rights to a just reward for use of their *programming*. This approach flows from the inherent difference between a station's signal and the programming transmitted via that signal -- a difference which Congress recognized:

> The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained in the signal.[23]

The Committee further emphasized the distinction in stating that:

> Cable systems carrying the signals of broadcast stations, whether pursuant to an agreement with the station or pursuant to the provisions of new sections 614 and 615 of the 1934 Act, will continue to have the authority to retransmit the programs carried on those signals under the section 111 compulsory license.[24]

In short, Congress created a separate and wholly distinct right personal and exclusive to broadcast licensees to control the use of their *signals* by cable operators, as well as other broadcast stations. This new right complements the current copyright protection afforded program suppliers and eliminates any additional need to protect their interests via any control which might be conferred by Section 325(B).[25] In short, declaring the retransmission consent option and right inalienable by the licensee will leave both stations and program suppliers protected.

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[23]S. Rep. at 36.

[24]*Id.*

[25]Under Section 111 of the Copyright Act, cable systems may secure a compulsory license to retransmit programming broadcast by television stations. Only broadcast stations carried in accord with current FCC rules may be subject to the compulsory license. Congress may decide at some future time to eliminate the compulsory license and provide program copyright owners absolute control over cable retransmission of their programming. At present, however, programming on signals carried pursuant to Sections 325(b), 614, or 615 is subject to carriage via the compulsory license, which, notably, conveys a multi-million award annually to program copyright owners.